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In the Supreme Court of the United States

OCTOBER TERM, 1972

72-343

JILL S. LOESER, LEONARD R. SCHEYER and GLADYS SCHEYER,

Petitioners,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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INDEX

PAGE

Opinion Below ..... 1, App. 1-5

Jurisdiction 2

Questions Presented 2

Statement 3-4

Reasons For Granting The Writ 5-16

Conclusion 16

CITATIONS

Cases

Armstrong v. Manzo, 380 U.S. 545 13

Bell v. Burson, 402 U.S. 535 13

Boddie v. Connecticut, 401 U.S. 371, 378 9

Clemens v. Dist. Court, 390 P. 2d 83 (Colo.) 11

Coe v. Armour Fertilizer Works, 237 U.S. 413, 424-425 ..... 9, 13

Ford v. Ford, 371 U.S. 187, 192 15

Freedman v. Poirer, 134 Misc. Rep. 253, 236 N.Y.S. 96, Aff'd 237 App. Div. 320, 237 N.Y.S. 618, 620 10

Fuentes v. Shavin, ... U.S. ....., 32 L. Ed. 556 13

Goldberg v. Kelly, 397 U.S. 254 13

Griffin v. Griffin, 327 U.S. 220 10

Grote v. Rogers, 149 A. 547 (Md.) 10

Halvey v. Halvey, 330 U.S. 610 15

Hess v. Pawlowski, 274 U.S. 372, 487 S. Ct. 362 6

Hohenadel v. Steele, 237 Ill. 229, 235 15

PAGE

International Shoe Co. v. Washington, 326 U.S. 310, 320, 66 S. Ct. 154, 160 6,8

Kimbrough v. Sullivan, 266 N.E. 2d 717, 720 Ill. App. 1971 9

McDonald v. Mabee, 243 U.S. 92, 37 S.Ct. 343 .....6, 7, 10

McGee v. International Life Insurance Co., 355 U.S. 220 8

May v. Anderson, 345 U.S. 528, 534 .....9, 14, 15

Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 7,9

Nelson v. Miller, 11 Ill. 2d 378, 143 N.E. 2d 673 5

Newman v. Greeley State Bank, 92 Ill. App. 638 9

Pennoyer v. Neff, 95 U.S. 715 .....6, 10

Phillips v. Anchor Hocking Glass Corp., 100 A. 212, 251, 413 P. 732, 735 11

Sniadach v. Family Finance Corp., 395 U.S. 337 13

Travellers Health Assn. v. Virginia, 339 U.S. 643 7

United States v. Gonzales, 348 U.S. 407 13

Walker v. Hutchinson, 352 U.S. 112 7

Wise v. Herzog, 114 F. 2d 486, 491 9

Wisconsin v. Constantineau, 400 U.S. 433 13

Wuchter v. Pizzutti, 276 U.S. 13, 24-25 9

PAGE

STATUTES

Arizona: Rule 4(e)(2)(a) Rules of Civil Procedure, 16 ARS 5

Arkansas: Ark. Stats. Ann. Sec. 27-2503A, 16 Supp..... 5

Michigan: Mich. Stats. Ann. Sec. 27A, 1913-1920-1923 (1962) 5

Louisiana: La. Rev. Stats. Sec. 13-3205 (1968) 5

Maryland: Md. Rules of Procedure, R. 107a(2) 1967 Supp. to Vol. 9B 5

Illinois Long Arm Statute, Ill. Rev. Stats. 1969, chap. 110, §17(b) 5

Indiana Trial Rule 4.11 (App. B) 6

Michie's Code of Va., Sec. 3848 (510)(55) 6

Illinois Habeas Corpus Act (Ill. Rev. Stats. 1969, chap. 65, sec. 19) 12

TEXTS

42 Am. Jur. PROCESS, §67, p. 57 7

Antieau, MODERN CONSTITUTIONAL LAW, Vol. 1, p. 541.. 7

94 L. Ed. 1167, Ann. "Developments of the Doctrine of *Pennoyer* v. *Neff* as regards jurisdiction over non-resident individuals" 7

MISCELLANEOUS

1962 Handbook, National Conference of Commissioners of Uniform State Laws 219-241, §2.01(b) 5

Kurland "The Supreme Court, The Due Process Clause and In Personam Jurisdiction" 25 Univ. of Chicago L. Rev. 569 11

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NO.

JILL S. LOESER, LEONARD R. SCHEYER and GLADYS SCHEYER,

Petitioners,

vs.

JULIUS LOESER,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

Petitioners pray that a writ of certiorari issue to review the judgment of the Supreme Court of Illinois, entered in this cause, on May 22, 1972.

OPINION BELOW

The opinion of the Supreme Court of Illinois, reported ..... Ill. 2d ....., 283 N.E.2d 884 is reprinted in Appendix "A" hereto.

JURISDICTION

The judgment of the Supreme Court of Illinois was entered on May 27, 1972. A petition for rehearing was denied on June 15, 1972.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(3). Questions under the United States Constitution sought to be reviewed by this Court were timely and properly raised in the Court below.

QUESTIONS PRESENTED

1. Whether an Indiana divorce decree, awarding child custody to an Indiana father in an *ex parte* proceeding, was in accordance with the Due Process clause of the Fourteenth Amendment, and entitled to Full Faith and Credit under Article IV of the U. S. Constitution, in view of the Indiana "long arm" statute permitting out-of-state service by mail, without restricting delivery to the named party defendant.

2. Whether a summary habeas corpus proceeding in Illinois without affording petitioners an opportunity to file responsive pleadings or to adduce evidence at a hearing, violated the Due Process guarantee of the Fourteenth Amendment.

3. Whether the Illinois Court under the *parens patriae* doctrine had the responsibility of conducting an evidentiary hearing as to the best interests and welfare of a minor child before peremptorily transferring custody from his mother, residing in Illinois, to his father, a resident of Indiana.

STATUTE INVOLVED

The pertinent provisions of the Indiana "long arm statute" are set forth in Appendix "B" hereto and are quoted in the opinion of the Illinois Supreme Court, Appendix "A", pp. App. 4 and 5.

STATEMENT

Julius and Jill Loeser, husband and wife, resided in Terre Haute, Vigo County, Indiana, with their three-year old son, Jeffrey. Following a domestic quarrel in March 1971, the husband voluntarily took the child to the wife's parents, Leonard and Gladys Scheyer, whose home is located at 911 Thackery, in Highland Park, Illinois.

Four days later, Jill Loeser moved to her parents' Highland Park home, in order to care for her young son, and she continued to reside with her parents and Jeffrey in Highland Park at the Thackery address. (R. 24).

On April 19, 1971, while Jill and the child were still residing at the Highland Park home of her parents, Julius filed for divorce in the Superior Court of Vigo County, Indiana. The alleged grounds were "cruel and inhuman treatment by a wife towards the husband and adultery." The complaint alleged that Jill was "not a fit and proper person for the care and custody" of Jeffrey, and prayed custody. (R. C8, 27). Neither the child nor the Scheyers were parties to the Indiana action.

Pursuant to the Indiana "long arm" statute, the summons and divorce complaint purportedly were sent to Highland Park, Illinois by mail for service upon Jill Loeser. (R. C7).

The mailed divorce process was in fact not received nor receipted by Jill, but by her mother, Gladys Scheyer at another Highland Park address, which was not the home or

usual place of abode of either Jill or Mrs. Scheyer. (R. 13, 91). (The Illinois Supreme Court assumes, without support in the record, that Jill learned of the Indiana proceedings by that service).

No appearance was filed on behalf of Jill and the Indiana court proceeded to grant an *ex parte* divorce to Julius and to award him custody of the minor child. The decree was entered June 21, 1971. (R. C9).

Seven days later Julius filed a petition for a writ of habeas corpus in the Circuit Court of Lake County, Illinois, joining Jill Loeser and her parents Leonard R. and Gladys Scheyer as parties respondent and attached a copy of the Vigo County divorce decree which awarded him "sole care, custody, control and education of Jeffrey Michael Loeser". (R. C9).

The request of Jill and her parents for leave to file responsive pleadings to the habeas corpus petition was denied. Likewise their request for a "de novo" hearing on the question of custody and for leave to introduce evidence as to the mother's fitness was denied.

On July 8, 1971 the Illinois court pre-emptorily ordered the turn over of the child to Julius on the ground that the Indiana decree was entitled to full faith and credit, and that the lapse of time between the Indiana decree (June 21) and the argument on the habeas corpus petition (July 8, 1971) was "too short a period" to indicate any "change of circumstances". (R. 9-10, 86).

The Supreme Court of Illinois affirmed the Lake County judgment. It rejected petitioners' challenge to the Indiana "long arm" statute and their deprivation of the right to plead and to be heard in an evidentiary hearing in the Lake County circuit court.

REASONS FOR GRANTING THE WRIT

I.

THE INDIANA "LONG ARM" STATUTE OFFENDS DUE PROCESS BECAUSE IT DOES NOT REQUIRE RESTRICTED MAIL DELIVERY AND WAS NOT ENTITLED TO FULL FAITH AND CREDIT BY THE ILLINOIS COURTS.

(a) The Indiana mail long arm statute is unique.

Although State long arm statutes are now commonplace, only a hand full of state statutes provide for direct mailing of service to out-of-state defendants[1] as the sole means of acquiring *in personam* jurisdiction.[2]

With the sole exception of Indiana, states which do have long arm mail statutes require registered or certified mail *with delivery restricted to the named defendant.*

The proposed Uniform State Long Arm statute contains such a provision, viz:

> "When service is made by mail, proof of service shall include a receipt signed by the addressee or other evidence of *personal delivery to the addressee,* satisfactory to the court." (1962 Handbook, National Conference of Commissioners of Uniform State Laws 219-241, §2.01(b).

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[1] *Viz.*, Arizona: Rule 4(e) (2) (a) Rules of Civil Procedure 16 ARS; Arkansas-Ark. Stats. Ann. Sec. 27-2503A, 16 Supp.; Michigan-Mich. Stats. Ann. Sec. 27A, 1913-1920-1923 (1962); Louisiana-La. Rev. Stats. Sec. 13-3205 (1968); Maryland-Md. Rules of Procedure, R. 107a(2) 1967 Supp. to Vol. 9B.

[2] See: Illinois long arm statute, Ill. Rev. Stats. 1969, chap. 110, §17(b) which requires personal service on an out-of-state defendant. See *Nelson* v. *Miller,* 11 Ill. 2d 378, 143 N.E. 2d 673.

The Indiana statute here in question, however, is unique in that, although service is initiated by registered or certified mail, delivery need not be restricted to the addressee.[3]

Under the Indiana statute acceptance of the mail by a person other than the addressee is sufficient to give the Indiana court *in personam* jurisdiction over the defendant.[4]

The constitutional requirement for service outside of the state of the forum is that the method of service provided for shall give "reasonable assurance that the notice will be actual." (*International Shoe Co.* v. *Washington*, 326 U.S. 310, 320, 66 S. Ct. 154, 160; *Hess* v. *Pawlowski*, 274 U.S. 372, 487 S. Ct. 362; *McDonald* v. *Mabee*, 243 U.S. 92, 37 S. Ct. 343.

From *Pennoyer* v. *Neff*, 95 U.S. 715, to *International Shoe* is a history of expanded recognition of a State's power to acquire *in personam* jurisdiction over non-residents.

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[3] See Appendix B. Prior to the 1970 amendment to the Indiana statute, provision was made for "substitute" mail service upon persons of suitable age and discretion "other than the named defendant." How the postman purporting to act as a sheriff could make this determination is not specified. The 1970 amendment eliminated the "substitute" provision, but still did not require restriction of delivery to the named addressee.

The fact that Jill Loeser in the instant case may have learned of the pendency of the Indiana divorce proceedings was due to mere happenstance that the person receiving and receipting the registered letter passed on the information.

Cf. typical non-resident motorist or securities regulation statute which empowers secretary of state to accept service; and who then mails notice by registered mail. Michie's Code of Va., Sec. 3848 (510)(55).

[4] Indiana Trial Rule 4.11 (App. B).

See: *Travellers Health Assn.* v. *Virginia*, 339 U.S. 643; Ann. "Developments of the Doctrine of *Pennoyer* v. *Neff* as regards jurisdiction over non-resident individuals" etc., 94 L. Ed. 1167. Although the historic trend has been to liberalize "substituted service", such statutes have always been subject to the test of the Due Process Clause.

As stated in 42 Am. Jur. Process, §67, at p. 57:

> "The efficiency of substituted or constructive service of process, when allowable, rests upon the presumption that notice will be given in a manner which is calculated to impart knowledge to the person who is to be notified. Its adequacy, so far as due process of law is concerned, is dependent upon whether or not the particular form of service is reasonably calculated to give the defendant actual notice of the proceeding and an opportunity to be heard."

But in *McDonald* v. *Mabee*, 243 U.S. 92, 37 S. Ct. 343, a more rigorous test was asserted. In that opinion Mr. Justice Holmes said:

> "Great caution should be used not to let fiction deny the fair play that can be secured only by a pretty close adhesion to facts. . . To dispense with personal service, the substitute *that is most likely to reach the defendant*, is the *least* that ought to be required, if substantial justice is to be done." (Emphasis added).

The "most-likely-to-reach-the-defendant" test was also insisted upon in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 ("Notice reasonably calculated, *under all circumstances* to apprise interested parties"), and in other "service by publication" cases, e.g. *Walker* v. *Hutchinson*, 352 U.S. 112. Scholars and critics have urged the Court to return to that due process standard. See, Antieau, Modern Constitutional Law, Vol. 1, p. 541.

The constitutional infirmity of the Indiana long arm statute is that it not only substitutes personal service by mail service, but unlike all other long arm statutes providing for mail service, there is no requirement of personal delivery to the addressee. The Indiana Court proceeded to enter an ex parte judgment as to custody of an out-of-state child without a showing of service made upon the mother (the only named defendant).

Citing *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, and *International Shoe Co.* v. *Washington*, 326 U.S. 310, the Illinois Supreme Court in the instant case asserts that the Indiana statute and rules meets constitutional test of due process if there is "reasonable assurance that notice will actually be given"—a criteria which is far less rigorous in requiring the substitute for personal service "that is most likely to reach the defendant." It is respectfully submitted that the Illinois Court's treatment of a vital question affecting the due process requirements of the Indiana long arm statute is cursory, superficial and unsatisfactory.

Lightly hurdling the constitutional question, the Illinois Supreme Court observes:

> "The record shows that notice of the hearing date of the Indiana divorce proceeding was served on Illinois counsel representing Jill Loeser." (App. A, p. App. 3).

Sending copies of *pre-judgment* pleadings to an attorney for a party is invalid service of process absent a showing that the attorney was authorized to accept such service. The mere fact that Jill Loeser became aware of the pendency of the Indiana divorce suit, did not subject her

to *in personam* jurisdiction of the Indiana court. *Wuchter* v. *Pizzutti*, 276 U.S. 13, 24-25; *Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424-425; ("Knowledge of the pendency of a suit has never . . . been deemed equivalent to service of summons") *Newman* v. *Greeley State Bank*, 92 Ill. App. 638)

The criterion of constitutional validity of a long arm statute may depend upon the type of proceeding involved, and the nature of the right to be adjudicated. (*Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313. The validity of the form of notice "depend[s] upon the importance of the interests involved and the notice of the subsequent proceedings." (*Boddie* v. *Connecticut*, 401 U.S. 371, 378).

The rationale for permitting service by mail is the ease, economy and speed which that type of process supposedly provides. Service by mail in a small money claim may not offend the due process clause (*Wise* v. *Herzog*, 114 F. 2d 486, 491), but the instant case presents a question of the most precious of personal rights—the right of a mother to her child. (*May* v. *Anderson*, 345 U.S. 528, 534). Service by mail is wholly inappropriate to the latter claim.

The objective of providing an inexpensive and convenient method of service does not justify an unrestricted delivery by mail. Absent the requirement of *restricted delivery*, service even by registered or certified mail, is an uncertain method of notice. Judicial notice of the increasing uncertainty and "possibilities of loss in the mails", i.e., that the mails no longer function adequately, has been noted by at least one court. (*Kimbrough* v. *Sullivan*, 266 N.E. 2d 717, 720 Ill. App. 1971).

A restriction of delivery, e.g., to the addressee only—would not materially add to the expense of service by mail, but would vouchsafe actual receipt of notice by the party

to be served. Yet, this simple and inexpensive safeguard is conspicuously lacking in the Indiana statute. In the context of the instant case where the Indiana court sought to reach a non-resident mother, to adjudicate her right to custody of a child who was not present in the State of Indiana, the Indiana long arm statute was clearly constitutionally deficient.

(b) A judgment of one state is entitled full faith and credit only if it satisfies the requirements of the due process clause.

A judgment of one state is entitled to full faith and credit only if it satisfies the requirements of the Due Process Clause; if it does not meet those requirements, it is not properly enforcible even within the State rendering it. *Pennoyer* v. *Neff*, 95 U.S. 714; *Griffin* v. *Griffin*, 327 U.S. 220. In *Griffin*, the Court held that due process requires that no other jurisdiction shall give effect, even as a matter of comity, to a judgment elsewhere acquired without due process of law.

Under the "most-likely-to-reach the-defendant" test as proclaimed in *McDonald* v. *Mabee*, 240 U.S. 92, 37 S. Ct. 343, *supra*, a number of state statutes providing for mail service on non-resident motorists have been stricken down as violative of due process, and hence not entitled to full faith and credit. See *Freedman* v. *Poirer*, 134 Misc. Rep. 253, 236 N.Y.S. 96, 100 aff'd 237 App. Div. 320, 237 N.Y.S. 618, 620; *Grote* v. *Rogers*, 149 A. 547 (Md).

Although not involving a full faith and credit problem, the Colorado Supreme Court struck down a Colorado Non-Resident Motorist Statute providing for service on non-resident motorists by registered mail, which failed to pro-

vide for an accounting of the disposition of the receipt—i.e., an absence of a requirement that the defendant either sign or refuse delivery of the mail summons. The Colorado Court held the statute unconstitutional because of the uncertainty of the notice. *Clemens* v. *Dist. Court*, 390 P. 2d 83 (Colo.).

A long arm statute is an extraterritorial extension of a state's power to adjudicate *in personam* rights of a resident of another state, or of a non-resident person. In a federal system, the sensitive concern of this Court is that the forum state's power through such device is not an encroachment on the resident state. (*Phillips* v. *Anchor Hocking Glass Corp.*, 100 A. 212, 251, 413 P. 732, 735, citing Kurland "The Supreme Court, The Due Process Clause and In Personam Jurisdiction" 25 Univ. of Chicago L. Rev. 569. Liberality in according full faith and credit to the Indiana judgment in the circumstances of the instant case should be tempered by that consideration.

II.

PETITIONERS WERE DEPRIVED OF DUE PROCESS IN BEING DENIED THE RIGHT TO FILE RESPONSIVE PLEADINGS AND THE RIGHT TO AN EVIDENTIARY HEARING ON THE HABEAS CORPUS PROCEEDINGS IN ILLINOIS.

If the basis of the Illinois Court's holding is that Jill Loeser had been given adequate notice and an opportunity to be heard in Indiana, and that the Indiana decree was therefore "res judicata", that rationale cannot be extended to the other petitioners. The maternal grandparents, Leonard and Gladys Scheyer, who were voluntarily given physical custody of the minor child by Julius Loeser, were

never parties to the Indiana proceedings. The Indiana court did not purport to decide *their* rights, and the Indiana court would not have had jurisdiction to do so. It is clear beyond peradventure, therefore, that the Indiana custody decree could not be "res judicata" as the Illinois Court asserts, as to the Scheyers.

The Scheyers, however, were made parties to the Illinois habeas corpus proceedings. *They,* at least, were entitled: (1) to file responsive pleadings to show the circumstances of their acquisition of custody and their right to continue custody; (2) to an evidentiary hearing on their right to custody, irrespective of the Indiana decree. Minimal due process required no less. They were given neither.

Even if the Indiana decree was *res judicata* as to Jill Loeser, she too, was entitled to file responsive pleadings[5] to the Illinois petition for habeas corpus and to a meaningful hearing thereon.

She should have been accorded the right to introduce evidence, tendered by her, to the effect that the Indiana custody decree was based on facts or information withheld or unknown to the Indiana Court, or the change in circumstances subsequent to the Indiana decree which entitled her to custody.

Instead of affording Jill and her parents of an opportunity to file pleadings and to present evidence, the "hearing" by the Illinois circuit court was devoted ex-

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[5] Although habeas corpus is regarded as a "summary proceeding" even under the Illinois Habeas Corpus Act (Ill. Rev. Stats. 1969, chap. 65, sec. 19) an interested party may make an answer or denial of material facts and to adduce evidence in opposition to habeas corpus.

clusively to argument by counsel as to whether the habeas corpus respondents were entitled to those elementary rights.

It is fundamental due process doctrine that the deprivation of a property right, whether a "necessity" or not, and surely a human right such as custody of a child, must be preceded by an opportunity for a hearing. *Armstrong* v. *Manzo*, 380 U.S. 545; *Bell* v. *Burson*, 402 U.S. 535; *Wisconsin* v. *Constantineau*, 400 U.S. 433.

This court has applied Fourteenth Amendment protection to "non-final" deprivations of property. *Sniadach* v. *Family Finance Corp.*, 395 U.S. 337; *Fuentes* v. *Shevin*, ... U.S. ....., 32 L. Ed. 2d 556. *A fortiori* that protection must be accorded to a final or indefinite deprivation such as custody of a child.

It is equally settled constitutional doctrine that "the right to a hearing means a right to a meaningful hearing" (*United States* v. *Gonzales*, 348 U.S. 407) and that the right to be heard means the "right to present evidence" (*Goldberg* v. *Kelly*, 397 U.S. 254).

The Illinois Supreme Court, in striking down the instant petitioners' contentions, implies that a de novo hearing by the Illinois court on the issue of custody could not have altered the entitlement of the Indiana judgment to enforcement. In so holding the Illinois court overlooks a rather fundamental constitutional principle announced recently by this Court in *Fuentes* v. *Shevin*, ... U.S. ....., 32 L.Ed. 556 at p. 574:

> "The right to be heard does not depend upon an advance showing that one will surely prevail at the hearing. 'To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law

would have led to the same result because he had no adequate defense upon the merits' (*Coe* v. *Armour Fertilizer Works*, 237 U.S. 413, 424). It is enough to invoke the procedural safeguards of the Fourteenth Amendment, that a significant property interest is at stake, whatever the ultimate outcome of a hearing on the contractual right to continued possession and use of the goods."

Protection which this court gave in *Fuentes* to "continued possession and use of . . . goods" surely must extend to continued possession of a child.

III.

UNDER THE PARENS PATRIAE DOCTRINE, THE ILLINOIS COURT HAD THE RESPONSIBILITY OF CONDUCTING AN EVIDENTIARY HEARING AS TO THE BEST INTERESTS AND WELFARE OF A MINOR CHILD.

Whatever the legal context, the welfare and best interests of a minor child are always the paramount concern of a court. Under the doctrine of *parens patriae*, even concepts of comity and full faith and credit yield to the resolution of this "elemental question". *May* v. *Anderson*, 345 U.S. 528, 533.

In its determination to enforce the Indiana judgment as to custody, the Illinois court breached its responsibility and abrogated its power to inquire into the best interests of a child which was physically within its jurisdiction, and which, significantly, had not been within the jurisdiction of the sister state rendering the judgment.

The Illinois court was tendered the transcript from the Indiana divorce trial which conclusively showed that the Indiana court had not only heard no evidence on the ques-

tion of the relative fitness of each parent to have custody of the child, but that the Indiana trial judge pointedly remarked: "We are trying a divorce case here, and not a hearing on custody in the future." (R. 71).

Even if the Indiana court had made a full and careful inquiry on the questions of fitness, custody and welfare, it is fundamental that the Illinois court had both the power and obligation to inquire into the right to custody and concomitant best interests of the child. (*May* v. *Anderson,* 345 U.S. 528). The fact that the Indiana court had not done so made it imperative that the Illinois court order such inquiry. In controversies involving custody of children "the public interest is strong," and supersedes parental differences or agreements. *Ford* v. *Ford,* 371 U.S. 187, 192.

The twin doctrines of full faith and credit (mandated by the Constitution) and comity (founded on public policy) are exalted versions of the more common place rule of *res judicata*: One state enforces the judgments of another state because the same subject matter should not be relitigated between the same parties.

But a decree awarding custody of a minor child is always "exceptional in character and is always regarded as temporary." (*Hohenadel* v. *Steele,* 237 Ill. 229, 235). By its nature, such a decree lacks the quality of finality which would prevent the court rendering it from altering a decree at any time as circumstances require. Hence, also, another court acquiring physical jurisdiction of a child is never so fettered by the decree of a sister state that it will not make an "independent determination" of the infant's best interests. What the original state could do, the second state may likewise do. (*Halvey* v. *Halvey,* 330 U.S. 610; *Ford* v. *Ford,* 371 U.S. 187; *May* v. *Anderson,* 345 U.S. 528).

The alleged short time span between the Indiana judgment and the Illinois petition for habeas corpus should not have been conclusive on the question whether or not there was sufficient change of circumstances. The very transfer of the child from one state to another was itself a substantial change, which justified a redetermination of the child's best interests. But in the light of other evidence tendered by the instant petitioners to show facts unknown or withheld from the Indiana court and a change in circumstances affecting the mother's fitness to care for the child, there was more than a sufficient showing to justify a *de novo* hearing in Illinois. Hence, the responsibility of the Illinois court was not foreclosed by the prior adjudication.

CONCLUSION

For all of the foregoing reasons, it is respectfully urged that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois.

Docket No. 44520—Agenda 29—March, 1972.

JULIUS LOESER, Appellee, v. JILL S. LOESER *et al.*, Appellants.

MR. JUSTICE GOLDENHERSH delivered the opinion of the court:

Respondents, Jill Loeser, Leonard R. Scheyer and Gladys Scheyer, appeal from the judgment of the circuit court of Lake County awarding a writ of *habeas corpus* which directed that Jeffrey, the three-year-old son of petitioner, Julius Loeser, and the respondent Jill Loeser be placed in the custody of the petitioner.

The record shows that petitioner, Julius Loeser, and the respondent Jill Loeser were married in Chicago in 1965 and throughout the period of their marriage resided in Terre Haute, Indiana. The respondents Leonard R. Scheyer and Gladys Scheyer, residents of Lake County, are the parents of respondent Jill Loeser. Jeffrey was born in January 1968.

The Loeser's marriage was beset with difficulties and in the early part of 1971 appeared to be in danger of termination. Because of the tensions in their home they agreed that it would be advisable that Jeffrey visit with his maternal grandparents while they sought a solution to their problems and on March 26, 1971, petitioner brought Jeffrey to the home of the respondents Scheyer, in Highland Park. Petitioner alleges that it was agreed between the parties that Jeffrey would be returned to Terre Haute in three weeks but the respondents dispute the allegation. On March 30, 1971, apparently without notice to

petitioner, respondent Jill Loeser departed Terre Haute and moved to her parents' home in Highland Park. It is not clear from the record whether she intended the removal to Illinois to be temporary or permanent.

On April 19, 1971, petitioner filed suit for divorce in Vigo County, Indiana. Service of process was effected by means of the Indiana "long arm" statute. On June 21, 1971, the divorce action was heard and a decree rendered and entered which *inter alia* found that petitioner was a fit person to have custody of Jeffrey and awarded him custody of the child. The decree shows that the respondent did not appear in the divorce action, and it was heard as a default matter.

The petition for *habeas corpus* was filed in the circuit court of Lake County on June 28, 1971, and the judgment from which the respondents appeal was entered on July 8, 1971.

Respondents contend that "irrespective of the Indiana decree awarding custody to the father, the Illinois circuit court had both the responsibility and the power to conduct an evidentiary hearing to determine the best interests and welfare of the child, and it was error not to have done so." They argue that since the Indiana court heard no testimony relevant to petitioner's fitness to have custody of the child, the court should have considered the issue *de novo* for the purpose of determining whether there were circumstances not known to the Indiana court or changes in circumstances which would affect the best interests of the child. Further, they argue that because Jeffrey, at the time when the Indiana decree was entered, was not in Indiana but was in fact in the custody of his maternal grandparents, the respondents Scheyer, who were not parties to the Indiana proceeding and not subject to the jurisdiction of the Indiana court, an evidentiary hearing

was required. They also contend that the trial court denied respondents' repeated requests for reasonable time in which to file responsive pleadings so "that issues could be framed prior to a meaningful hearing on the petition for *habeas corpus.*"

In *People ex rel. Bukovich* v. *Bukovich,* 39 Ill.2d 76, we said at page 79: "The courts of Illinois have both the responsibility and the power to inquire into the right to custody and concomitant best interests of a child within the jurisdiction where the passage of time since a prior custody determination of a sister State makes it possible that the circumstances pertaining to the fitness of the parties seeking to be awarded custody of the minor may have substantially changed." The decision as to whether the power should be exercised here is dependent upon consideration hereinafter discussed.

The record shows that respondent Jill Loeser had ample opportunity to defend the action in Indiana. In colloquy in the trial court and in respondents' brief it is admitted that she received a summons and a copy of the complaint. The record shows that notice of the hearing date of the Indiana divorce proceeding was served on Illinois counsel representing respondent Jill Loeser and that an Indiana attorney appeared at the hearing and upon interrogation advised the court that he had been retained by her Illinois counsel "to consult with him," that he had been advised by her Illinois counsel that no one would appeal for her and that he was there as an "observer."

Under Indiana law the provision of the decree awarding custody of Jeffrey to the petitioner was *res judicata* and in order to justify a change of custody there must have been a change in conditions of such character as to make the change of custody necessary for the welfare

and happiness of the child. (*Brickley* v. *Brickley* (1965), 247 Ind. 201, 210 N.E.2d 850.) It is true that the Indiana court did not hear testimony specifically directed toward the question of petitioner's fitness to have custody of the child. We note, however, that although his fitness to have custody was not made an issue in the case, there is nevertheless, sufficient testimony to support the court's finding.

With respect to respondents' contention that they should have been given time to file responsive pleadings, the record fails to reflect what issues would have been "framed" for determination in a "meaningful hearing," and upon the record before us we hold that the circuit court did not err in awarding the writ without an evidentiary hearing.

Respondents contend next that the Indiana decree is invalid for the reason that the statute and rules under which service of process was effected are in derogation of Illinois law and offend due process in that they do not require "restricted mail delivery." Rule 4.1 of the Indiana Rules of Trial Procedure provides for service of process by "sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter." Rule 4.4 provides: "Any person * * * that is a nonresident of this state, a resident of this state who has left the state, * * * submits to the jurisdiction of the courts of this state as to any action arising from the following acts * * * living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the

state. • • • *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons: (1) As provided by Rules 4.1. • • • " Trial Rule 4.11 provides: "Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court • • • shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court • • • shall show the date and place of mailing, a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become part of the record. If a mailing by the clerk is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service."

The requisites of due process are satisfied if the manner of effecting service of summons gives reasonable assurance that notice will actually be given and the person against whom the action is brought is given reasonable time to appear and defend on the merits. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 2 L.Ed. 2d 223, 78 S.Ct. 199; *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L.Ed.95, 66 S.Ct. 154.) Service as effected under the Indiana statute and rules meets this test, and due process does not require precise compliance with the allegedly more stringent requirements of the Illinois statute and the rules of this court.

We find no basis for reversal and the judgment of the circuit court of Lake County is affirmed.

Judgment affirmed.

APPENDIX B

INDIANA

RULES OF TRIAL PROCEDURE

I. Scope of Rules—One Form of Action

Trial Rule 1

SCOPE OF THE RULES

Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action.

II. Commencement of Action; Service of Process

* * *

Trial Rule 4

PROCESS

(A) *Jurisdiction over parties or persons—In general.* The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

* * *

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* Reprinted in Special Supplement to Burns Annotated Indiana Statutes Vol. 2, Part 1. (The Bobbs-Merrill Co. Inc., 1970)

Trial Rule 4.1

SUMMONS: SERVICE ON INDIVIDUALS

(A) *In general.* Service may be made upon an individual, or an individual acting in a representative capacity, by:

(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode with some person of suitable age and discretion residing therein; or

(4) serving his agent as provided by rule, statute or valid agreement.

(B) *Copy service to be followed with mail.* Whenever service is made under subsection (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

• • •

Trial Rule 4.4

SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

(A) *Acts serving as a basis for jurisdiction.* Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

• • •

(5) owning, using, or possessing any real property or an interest in real property within this state; or

• • •

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations arising from an Indiana judgment for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) as provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions);

• • •

Trial Rule 4.11

SUMMONS: REGISTERED OR CERTIFIED MAIL

Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court or a governmental agent under Rule 4.10 shall send the summons and complaint to the person being served at the address supplied upon the summons, or, if none is furnished, to his known address or last known address as can otherwise be determined. In his return the clerk of the court or the governmental agent shall show the date and place of mailing a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become a part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested. When service is made by registered or certified mail only those persons of suitable age and discretion designated to receive service of process under Rule 4.1(1) through (4) may accept such service.

1970 AMENDMENTS TO RULES OF TRIAL PROCEDURE

Trial Rule 4.1

SUMMONS: SERVICE ON INDIVIDUALS

(A) • • •

(1) • • •

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode.

(4) • • •

(As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment deleted the words "with some person of suitable age and discretion residing therein; or" at the end of subdivision (A)(3).

Trial Rule 4.4

SERVICE UPON PERSONS IN ACTIONS FOR ACTS DONE IN THIS STATE OR HAVING AN EFFECT IN THIS STATE

(A) • • •

(1) • • •

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state.

(B) • • •

(As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment deleted the words "arising from an Indiana judgment" following the words "as to all obligations" in subdivision (A)(7).

Trial Rule 4.11

SUUMONS: REGISTERED OR CERTIFIED MAIL

Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court or a governmental agent under Rule 4.10 shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court or the governmental agent shall show the date and place of mailing, a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom. The return along with the receipt shall be promptly filed by the clerk with the pleadings and become a part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service. (As amended December 7, 1970, effective January 1, 1971.)

Amendment. The 1970 amendment substituted the words "or furnished by the person seeking service" for "or, if none is furnished, to his known address or last known address as can otherwise be determined" at the end of the first sentence, and deleted the last sentence which read: "When service is made by registered or certified mail only those persons of suitable age and discretion designated to receive service of process under Rule 4.1(1) through (4) may accept such service," and added the clause at the end following the words "as requested."

• • •

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972.

No. 72-343

JILL S. LOESER, LEONARD R. SCHEYER AND GLADYS SCHEYER,

Petitioners,

vs.

JULIUS LOESER,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

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INDEX.

	PAGE
Questions Presented	1
Statutes Involved	2
Respondent's Statement	3
Reasons for Denying the Writ	8
Conclusion	21
Appendix	A1

CITATIONS.

Cases.

Berlin v. Berlin, 21 N. Y. 2d 371, 235 N. E. 2d 109 (1967) 16, 20

Earle v. McVeigh, 91 U. S. 503, 23 L. Ed. 398 (1875) ... 12

Ford v. Ford, 371 U. S. 187, 83 S. Ct. 273 (1962) 18-20

International Shoe Co. v. Washington, 326, U. S. 310, 66 S. Ct. 154 (1945) 10, 12

Karlsson v. Rabinowitz, 318 F. 2d 666, 668 (4th Cir. 1963) 11, 12

May v. Anderson, 345 U. S. 528, 73 S. Ct. 840 (1952) .. 18, 19

McGee v. International Life Insurance Co., 355 U. S. 220, 78 S. Ct. 199 (1957) 10

Mullane v. Central Hanover Bank & Trust Co., 339 U. S. 306, 70 S. Ct. 652 (1949) 12

Nelson v. Miller, 11 Ill. 2d 378, 143 N. E. 2d 673 (1957) 11

People ex rel. Bukovich v. Bukovich, 39 Ill. 2d 76, 233 N. E. 2d 382 (1968) 16

People ex rel. Koelsch v. Rone, 3 Ill. 2d 483, 121 N. E. 2d 738 (1954) 16

People ex rel. Potter v. Potter, 2 Ill. App. 2d 419, 120 N. E. 2d 46 (1954) 16

Perry v. Superior Court of Contra Costa County, 7 Cal. App. 3d 326, 86 Cal. Rep. 607, 610 (1970) 16, 20

Wise v. Herzog, 114 F. 2d 486 (D. C. 1940) 8,9

Statutes.

Supreme Court Rule 19(a) 12, 21

United States Code Annotated, Title 28, Sec. 1738 2

Illinois Revised Statutes, Ch. 65, Sec. 19 15

Indiana Trial Rule 4.1(A)(1) 13

Indiana Trial Rule 4.4(A)(7) 19

Texts.

Black's Law Dictionary, p. 661 (4th Ed.) 14

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Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

QUESTIONS PRESENTED.

The Petition sets forth three questions presented to this Court:

1. Petitioners challenge an Indiana divorce decree awarding child custody to an Indiana father where the mother was served in Illinois under a long arm statute authorizing such service by registered or certified mail without restricting delivery to the named party defendant. Petitioners describe the Indiana proceedings as "ex parte," and claim that the service violated due process.

Petitioners cite no authority (and we know of none)

requiring that the certified or registered mailing be receipted for only by the addressee and no one else. The Indiana proceedings were not ex parte, since Petitioners had admittedly received notice of all phases of the Indiana proceedings (including the setting of the trial date) in compliance with the Indiana statutes.

2. Petitioners assert they were denied due process of law in the Illinois habeas corpus proceedings because they were allegedly denied the right to file responsive pleadings or adduce certain evidence at a hearing.

In fact, Petitioners did have the right to file responsive pleadings, but they waived that right and elected instead to devote their attentions to a different strategy, as we will show below. Moreover, the evidence they belatedly sought to introduce was irrelevant as bearing on issues previously adjudicated and subject to the doctrine of res judicata.

3. For the reasons stated above, and elaborated upon below, the concept of parens patriae has no application to the facts in this case, and in no event could that concept justify the relitigation of matters litigated in the courts of a sister state (U. S. Const. Art IV, Sec. 1; 28 U. S. C. A., Sec. 1738).

STATUTES INVOLVED.

The applicable provisions of the Indiana long arm statutes, contained in the Indiana Trial Rules, are set forth in Appendix A.

Significantly, the Petitioner Jill Loeser admitted below that she was an Indiana resident when the Illinois and Indiana proceedings were initiated. Therefore, Burns Indiana Statutes, Sec. 3-1205, which provides that summons could have properly been left at her Terre Haute residence, is set forth in Appendix B.

The powers of the Indiana courts with respect to

guardianship, custody, support and education of children (Burns Ind. Stat., Secs. 3-1219) is set forth in Appendix C.

The full faith and credit provisions of the United States Constitution are set forth in Appendix D, and the corresponding statute (28 U. S. C. A., Sec. 1738) is set forth in Appendix E.

The scope of the Illinois Civil Practice Act (Ill. Rev. Stat., Ch. 110, Sec. 1) is set forth in Appendix F, and the relevant portions of the Illinois Habeas Corpus Act (Ill. Rev. Stat., Ch. 65) are set forth in Appendix G.

RESPONDENT'S STATEMENT.

The ultimate issue in the proceedings below involved the custody of a four-year-old child ("Jeff"). The Indiana court awarded custody to Respondent herein ("Loeser") after finding that the mother ("Jill") was guilty of adultery and cruel and inhuman treatment, and that she was unfit to have custody of Jeff while Loeser was fit to have the care and custody of the child. The Illinois court thereafter granted Loeser's petition for a writ of habeas corpus to secure his custody of the child.

We respectfully submit that Petitioners have had every constitutional safeguard afforded them.

The following chronology of facts is submitted to aid the Court in passing upon the questions raised by the Petition for a Writ of Certiorari:

(1) Loeser and Jill maintained their residence in Terre Haute, Indiana from the time of their marriage on August 25, 1965, until after the divorce action was filed in Indiana.

(2) Loeser and Jill, prior to the latter's departure from Terre Haute, agree it would be in the best interests of their son to be removed temporarily

from the charged atmosphere and the tensions existing at home (R. 87) and for Jeff to be taken to Highland Park, Illinois, to the home of Jill's parents (the other Petitioners) for a period of one week (R. 69) (later extended, by agreement between Leonard Scheyer, Jill's father, and Loeser's counsel for an additional two weeks). Pursuant to said agreement, Loeser took Jeff to Highland Park alone, while Jill continued to occupy the family residence in Indiana. The agreement to return Jeff was breached by Jill and her parents who collectively refused to return Jeff to Indiana (R. 64).

(3) At the time of Jill's departure from Terre Haute shortly thereafter, she:

(a) Purchased a round-trip ticket to Chicago;

(b) Left most of her clothes and personal effects in the parties' home in Terre Haute (R. 70);

(c) Left her automobile in Terre Haute;

(d) Left stocks and bonds in a Terre Haute bank;

(e) Promised Loeser to return to Indiana and to submit to a psychiatric examination by a specialist residing in Indianapolis, pursuant to an appointment previously arranged and of which she was aware (R. 67, 69); and

(f) Extracted an agreement from Loeser that she would be permitted to live in the residence of the parties and that he would move out (R. 69).

(4) Jill admitted in her amended separate maintenance complaint that she left Indiana with the

intention of returning to Indiana (having purchased a round-trip ticket) and that she had not terminated her Indiana domicile until May 22, 1971, more than a month after the Indiana proceedings had begun (R. 87-88).

(5) A summons and copy of the divorce complaint were sent by certified mail, addressed to Jill at the residences of her parents and only sister, and the return receipts were signed by her sister and mother (R. 91).

(6) Copies of all pleadings were promptly sent to Jill and to her counsel in Chicago and Terre Haute (R. 73-74).

(7) On April 29, 1971, Loeser's counsel sent to one of Jill's attorneys notice by mail of the assignment for trial of the divorce action.

(8) On June 3, 1971, counsel for Loeser sent to Jill by certified mail, receipt of which was acknowledged by Jill's mother, a copy of an order issued by the divorce court requiring Jill to present herself at the offices of Dr. William C. Shriner for a psychiatric evaluation and a check to reimburse Jill for expenses. The order was ignored.

(9) On June 10, 1971, counsel for Loeser sent to Jill's attorneys in Chicago, and to her Indiana attorneys who she had retained shortly after she received the summons, a copy of Count II of the complaint wherein Loeser sought to enjoin Jill from prosecuting an action for separate maintenance in Illinois while the divorce action was pending in Indiana (R. 73-74). Such an injunction order was, in fact, entered on June 14, 1971. It, too, was ignored.

(10) The divorce was tried on June 21, 1971 (R. 39).

(11) Jill chose not to participate in the Indiana proceedings, and she did not enter an appearance therein (R. 74).

(12) Jill's Indiana counsel, Frederick T. Bauer, appeared as a spectator at the trial and testified as a witness when called by Loeser's counsel (R. 73-74).

(13) Jill's Illinois attorneys admittedly knew of the Indiana proceedings, but advised her that she should not appear and defend and that it would be better to defend in Illinois any subsequent action brought by Loeser to enforce the Indiana decree (R. 92).

(14) Jill's failure to appear was noted by the trial court and she was defaulted (R. C8).

(15) The divorce decree, final in Indiana upon entry, was entered by the trial court on June 21, 1971 (R. C10), after a hearing which included the testimony of several witnesses. The Indiana court granted the divorce on express findings of Jill's adultery and her cruel and inhuman treatment toward Loeser (R. C8).

(16) This Habeas Corpus proceeding was instituted in Illinois on June 28, 1971, *only seven days* after entry of the divorce decree (R. C3).

(17) On the same date the proceedings below were instituted, the Illinois court ordered Jill and her parents to produce Jeff at the hearing which was set for July 8, 1971 (R. C12). All parties were served personally with process and with copies of this order on June 29, 1971 (R. C16).

(18) The Honorable Thomas Doran presided at the July 8 hearing. All parties appeared by counsel, and in addition Jill and her father, Leonard R. Scheyer, were personally present. Jeff was not produced upon the assurance of Petitioners' counsel that he was but "minutes" away from the courthouse and that he would be produced if required (R. 79).

(19) At the conclusion of the hearing which lasted nearly the entire day, Judge Doran announced his ruling and directed Petitioners to produce Jeff forthwith (R. 94). Although Jill was in the courtroom or its immediate vicinity throughout the proceedings (R. 94-95), she *literally disappeared* immediately upon the announcement of the Court's decision (R. 95)

(20) The court ordered the sheriff to produce Jill and Jeff pursuant to the writ of habeas corpus issued by him (R. 95-96), but, because Jill had immediately absconded from the jurisdiction with Jeff, and their whereabouts were unknown, the court's order could not be enforced.

received actual notice. This provision was upheld. In the instant case we have even more, since there was full compliance with the statute in question *and* there was actual notice and knowledge of the Indiana proceedings.

As noted, Jill Loeser was a resident of Indiana at all times pertinent to the Indiana and Illinois proceedings below. The record establishes that she was only temporarily outside of Indiana when process was served. In testing the adequacy of notice in terms of due process, attention must be directed to *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 158 (1945), where this Court said:

> "... in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contracts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'"

In *International Shoe*, the "minimum contacts" that justified service of process by mail consisted of the defendant's transacting business in the forum state. Here, the contacts are far greater since Jill had been a continuous and bona fide resident of Indiana for several years up to and including the date service was made. Can she seriously complain that defending the divorce suit, after timely receiving notice thereof, would violate "traditional notions of fair play and substantial justice?"

This Court upheld out-of-state service by registered mail in *McGee* v. *International Life Insurance Co.*, 355 U. S. 220, 78 S. Ct. 199 (1957). After finding the requisite minimum contacts, the Court said (78 S. Ct. at 202):

> "At the same time Respondent was given a reasonable time to appear and defend on the merits after being notified of the suit. Under such circumstances it had no vested right not to be sued in California."

Illinois, which Jill now claims as a sanctuary from Indiana process, has itself joined the realistic trend of liberalizing out-of-state service where it is fair and reasonable to do so. Thus, in *Nelson* v. *Miller,* 11 Ill. 2d 378, 384, 143 N. E. 2d 673, 676 (1957), the Illinois Supreme Court said:

> "The foundations of jurisdiction include the interest that a State has in providing redress in its own courts against persons who inflict injuries upon, or otherwise incur obligations to, those within the ambit of the State's legitimate protective policy. The limits on the exercise of jurisdiction are not 'mechanical or quantitative . . ., but are to be found *only in the requirement that the provisions made for this purpose must be fair and reasonable in the circumstances, and must give to the defendant adequate notice* of the claim against him, and an adequate and realistic opportunity to appear and be heard in his defense.' " (Emphasis added.)

Petitioners do not contest service by registered mail; they argue only that the mail should be by delivery to no one other than the addressee. Is it less "fair and reasonable" for Jill to defend in Indiana, the state of her residence, after receiving actual notice in compliance with applicable statutes, than for her husband to be without a remedy if she refused to accept delivery of restricted mail? On the basis of all relevant case law, as well as on common sense, we think not.

As said in *Karlsson* v. *Rabinowitz,* 318 F. 2d 666, 668 (4th Cir. 1963):

> "To the extent that there is any rule or guide to be followed by the federal courts in such a case, it is that where *actual notice* of the commencement of the action and the duty to defend has been received by the one served, the provisions of Rule 4(d)(1) should be liberally construed to effectuate service and uphold the jurisdiction of the court. . . ." (Emphasis added.)

Referring to the case of *Earle* v. *McVeigh*, 91 U. S. 503, 23 L. Ed. 398 (1875), the Court in *Karlsson* added (318 F. 2d at 668):

> "There, as here, the defendant *actually received notice* of the action and appeared specially and moved to quash . . . we think justice has been done." (Emphasis added.)

III.

The Indiana "Long Arm" Statute Does Not Offend Due Process. The Indiana Decree Is Entitled to Full Faith and Credit.

Respondent submits that Petitioners have failed to demonstrate a proper reason for granting the writ of certiorari. As shown above, the questions presented have been thoroughly considered in numerous cases in this and lower courts, there does not appear to be any conflict among the decisions, and there is no basis on which to believe that the opinion of the Illinois Supreme Court is "probably not in accord with applicable decisions of this court." Supreme Court Rule 19(a).

As already noted, Petitioners assert that the Indiana long arm statute, in not requiring restricted delivery, violates due process, and that the Indiana judgment should not have been given full faith and credit in Illinois.

The constitutionality of a long arm statute would seem to depend upon whether the statutory mode of service "is reasonably calculated to apprise" the defendant of the suit. *International Shoe Co.* v. *Washington*, 326 U. S. 310, 66 S. Ct. 154, 160 (1945).

This test was reaffirmed in *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 314-15, 70 S. Ct. 652, 657 (1949), where this Court said:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is *notice reasonably calculated, under all the circumstances, to apprise* interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . The notice must be of such nature *as reasonably to convey the required information.* . . . But, if with due regard for the practicalities and peculiarities of the case, these conditions are reasonably met, *the constitutional requirements are satisfied.* . . .
>
> *"The reasonableness and hence the constitutional validity of any chosen method may be defended on the ground that it is in itself reasonably certain to inform those affected.* . . ." (Emphasis added.)

Applying these "elementary and fundamental" standards to the Indiana statute, there can be little question but that the constitutional requirements are satisfied. The statute requires that the mailing be by registered or certified mail or other public means by which a letter of acknowledgment or receipt may be requested and obtained. The mail should be addressed to the defendant's residence or place of business or employment with return receipt requested and returned showing receipt of the mailing. Indiana Trial Rule 4.1(A)(1).

Respondent submits that this procedure is "reasonably calculated" to apprise a defendant of the pendency of a suit.

In the case at bar, Respondent knew that Jill was staying at the home of either her mother or only sister when service was made; accordingly, he caused the requisite mailing to be made to both addresses. Thus, Respondent did all that he could do to apprise Jill of the Indiana proceedings. Proof of the adequacy of the service is found in the plain fact that Jill, by virtue of those mailings, did

indeed become apprised of the proceedings. Her notice as well as her ability to prepare a defense would have been no better had she, instead of her mother and sister, actually signed the receipts.

In Point I of their petition, Petitioners repeatedly characterize the Indiana proceedings as "ex parte" because of Jill's absence. "Ex parte" is defined in *Black's Law Dictionary*, p. 661 (4th Ed.) as follows:

> "In its more usual sense, *ex parte* means that an application is made by one party to a proceeding in the absence of the other. Thus, an *ex parte* injunction is one granted without the opposite party having had notice of the application. *It would not be called 'ex parte,' if he had proper notice of it and chose not to appear to oppose it.*" (Emphasis added.)

Under this definition the Indiana proceedings were anything but ex parte. Jill admittedly had notice but "chose not to appear" in her deliberate attempt to challenge the Indiana divorce proceedings.

IV.

Petitioners Were Not Deprived of Due Process in the Illinois Habeas Corpus Proceedings.

Point II of the Petition is concerned with certain rulings of the trial court in the Illinois habeas corpus proceedings. Respondent submits that these rulings simply do not present questions which would support a petition to this Court for a writ of certiorari. The case law in this area is well settled and free from confusion.

Petitioners urge a denial of due process "in being denied the right to file responsive pleadings and the right to an evidentiary hearing" in the Illinois habeas corpus proceedings. As a point of correction, Petitioners *did* have the

right to file responsive pleadings, and a hearing on the habeas corpus petition *did* take place.

The habeas corpus suit was filed on June 28, 1971, all of the present Petitioners were personally served on June 29, 1971, and the hearing took place on July 8, 1971. They had at least nine days in which to file motions or responsive pleadings, but they filed nothing. (During that interim, however, they filed comprehensive pleadings in a collateral proceeding in an effort to block the habeas corpus hearing, and in fact prepared a notice of appeal and appeal bond which they tendered the moment the trial court granted the writ.) While Petitioners may not have filed responsive pleadings, they clearly were not deprived of the right or opportunity to do so.

On the question of the hearing itself, the Illinois statute specifically provides (Ill. Rev. Stat. Ch. 65, Sec. 19):

> ". . . the court or judge shall proceed in a summary way to examine the cause of the imprisonment or restraint, hear the evidence produced by any person interested or authorized to appear, both in support of such imprisonment or restraint and against it, and thereupon shall dispose of the party as the case may require."

A hearing was held. Petitioners could have introduced evidence in opposition to the writ, but did not do so. Instead, they orally sought leave of the trial court to introduce, *at a subsequent date*, alleged evidence as to Jill's fitness that should have been introduced, if at all, in the earlier Indiana proceedings. The trial court properly ruled that the Indiana judgment was res judicata and entitled to full faith and credit, and, therefore, the alleged evidence as to Jill's fitness was inappropriate. Petitioners offered no other evidence.

Respondent acknowledges that, where a long passage of time elapses after a custody adjudication, the courts of a

sister state may inquire into whether a substantial change in circumstances has taken place since that adjudication. However, our research discloses no case (and Petitioners cite none) which permits an evidentiary hearing on the fitness of the parties where, as here, both were subject to the jurisdiction of the court which first passed on custody, and where, as here, the enforcement proceedings were initiated very shortly thereafter. The decisions are to the contrary. *E.g. People ex rel. Potter* v. *Potter*, 2 Ill. App. 2d 419, 120 N. E. 2d 46 (1954); *People ex rel. Koelsch* v. *Rone*, 3 Ill. 2d 483, 121 N. E. 2d 738 (1954); *Perry* v. *Superior Court of Contra Costa County*, 7 Cal. App. 3d 326, 89 Cal. Rep. 607 (1970); *Berlin* v. *Berlin*, 21 N. Y. 2d 371, 235 N. E. 2d 109 (1967). Only where there has been a considerable "passage of time," so that circumstances could have "substantially changed," would the forum court be justified in entertaining an additional hearing into the best interests of the child. *People ex rel. Bukovich* v. *Bukovich*, 39 Ill. 2d 76, 79, 233 N. E. 2d 382 (1968).

All the decided cases hold that the former decree must be given full faith and credit in a subsequent action as to facts existing at the time of the former decree, even if a long passage of time warrants a hearing as to changed circumstances *since* said time.

Surely, it could not seriously be contended that a substantial change in circumstances took place within the seven days between the Indiana decree and the commencement of the Illinois habeas corpus proceedings. Moreover, the Petitioners have yet to suggest what substantial change *could* have taken place within such a short time. We call the Court's attention to *People ex rel. Potter* v. *Potter*, 2 Ill. App. 2d 419, 427, 120 N. E. 2d 46 (1954), where the Illinois court said:

> ". . . nor could it be said that there were any changed circumstances in the status of the wife or child after

the decree was signed, until the time of the hearing, because the petition for habeas corpus was filed within *ten days* after the divorce decree was signed." (Emphasis added.)

Petitioners urge that the Indiana courts did not and could not decide the rights of the maternal grandparents in the divorce proceedings and, therefore, the Indiana custody decree could not be res judicata. The grandparents were made parties to the habeas corpus proceedings because the child was temporarily staying at the grandparents' home. Had they not been joined, Loeser would have been confronted with the argument that Jeff's physical presence was with the grandparents and not with the mother and, therefore, the writ could not be executed against the latter.

Nowhere is it argued that the grandparents have any standing with respect to custody. They merely argue that inasmuch as they were made parties in Illinois, the Indiana custody order somehow becomes unimportant. As pointed out above, they were joined not because they had standing with respect to custody, but rather because they happened to have temporary physical control of the child (in breach of a prior agreement to return him).

V.

The Illinois Court Had No Responsibility to Conduct an Evidentiary Hearing as to the Best Interests and Welfare of the Child.

Respondent agrees with the view that the welfare and best interests of a minor child are of paramount concern to the court. The parties differ, however, as to when the court should conduct a hearing in these areas.

As shown in the preceding section of this brief, the law on this question is well established. Where a state has

jurisdiction over the parties, conducts a hearing, and enters a custody decree, that decree is res judicata and is entitled to full faith and credit in sister states. This is the universal view, as typified by the decisions cited in the preceding section.

True, the forum court may hold a hearing to determine if the child's best interests are affected in view of a substantial change in circumstances if a long time has elapsed between the earlier decree and second suit, but the former is nonetheless res judicata as to circumstances existing at the time of its entry, and, to that extent, full faith and credit applies. The cases cited earlier, and the authorities relied upon therein, put this point to rest.

We have already discussed the fact that a substantial change in circumstances could hardly have taken place in the brief seven day period between the Indiana decree and the initiation of the habeas corpus suit, and that, in any event, Petitioners have yet to suggest such a change.

In an attempt to sidestep the settled law, Petitioners imply that the full faith and credit doctrine must "yield" in child custody cases (Pet'n 14). To support this contention, they make brief reference to *May* v. *Anderson*, 345 U. S. 528, 73 S. Ct. 840 (1952), and *Ford* v. *Ford*, 371 U. S. 187, 83 S. Ct. 273 (1962). These two decisions are simply inapplicable on their facts, and are in no way inconsistent with the settled law recited above.

In *May*, a Wisconsin divorce was entered on process served on the wife in Ohio pursuant to the Wisconsin long arm statute. This Court specifically determined, however, that the wife was "neither domiciled, a resident nor present" in Wisconsin (345 U. S. at 533). Moreover, the Court expressly observed that the Wisconsin statute "makes no mention of its availability in a proceeding for the custody of children" (345 U. S. at 531). For these two reasons, the

Wisconsin long arm statute was insufficient to give the Wisconsin court *in personam* jurisdiction over the mother relative to the custody issue.

May is therefore readily distinguishable from the present case for two obvious and significant reasons: (1) the Indiana long arm statute expressly applies to custody and related issues (Trial Rule 4.4(A)(7)), whereas the Wisconsin statute did not; and (2) at the time of service, Jill was a resident of and domiciled in the state of Indiana, while the defendant in *May* was neither a resident nor domiciliary of Wisconsin and did not have the essential "minimum contacts" with that state.

Ford v. *Ford* is likewise distinguishable. There, a Virginia court entered an agreed custody order based upon an agreement between the parents. The order was entered without any hearing whatsoever into the child's welfare. The issue was whether the South Carolina court must thereafter give full faith and credit to the agreed order. This Court sanctioned a hearing in South Carolina since the trial judge in Virginia "never even saw, much less passed upon, the parents' private agreement for custody and heard no testimony whatever upon which to base a judgment as to what would be best for the children" (371 U. S. at 194).

Significantly, the Court did not hold that the Virginia order was not entitled to full faith and credit. Instead, it held that since not even the Virginia court "would consider itself bound" by this agreed order, the South Carolina court should not be bound. Thus, the order was given the same faith and credit that it would have been given in Virginia.

In the present case, unlike *Ford,* the Indiana court did conduct an evidentiary hearing into the child's welfare and the relative fitness of the parents to have custody. The

record herein contains a transcript of the Indiana hearing, which included the testimony of several witnesses. This transcript clearly and repeatedly reveals Jill's immoral and emotional unfitness to have Jeff's care and custody, and the Court made specific findings on the custody issue. (A copy of the Indiana decree is set forth in Appendix H.)

If Petitioners' position were adopted, each of the fifty states would have the power to determine the custody of a child temporarily (or even wrongfully) within its borders. A parent in possession could move from state to state for successive hearings until a favorable decision were reached. That the witnesses to material facts would not be available would, apparently, not be important. The doctrines of full faith and credit, comity and res judicata are designed to avoid such possibilities.

The view Respondent urges has been articulately set forth in *Berlin* v. *Berlin*, 21 N. Y. 2d 371, 235 N. E. 2d 109, 112 (1967):

> "*There may be times when the courts of this State should be reluctant to exercise the discretionary power they have to modify an out-of-State decree* (see e.g., Matter of Lang v. Lang, 9 A. D. 2d 401, 193 N. Y. S. 2d 763, aff'd. 7 N. Y. 2d 1029, 100 N. Y. S. 2d 71, 166 N. E. 2d 861). *This is especially so where the child is brought into this State for the purpose of avoiding a custody decree recently made by a sister State court.* Thus, it has been said: 'It is especially desirable, from the point of view of the child's welfare, that such litigation as this should not be subject to endless repetition. If the matter has been competently litigated, decrees of foreign courts should be given recognition. *If the foreign proceedings have taken place in the state where the child habitually lives, not necessarily where it is technically domiciled, it would seem desirable that other state courts decline to use their power merely because of the temporary presence of the child.*'" (Emphasis added.)

And, as said in *Perry* v. *Superior Court of Contra Costa County*, 7 Cal. App. 3d 326, 86 Cal. Rep. 607, 610 (1970):

> "The 'changed circumstances' rule does not permit a party to go from state to state, relitigating issues which have very recently been resolved against him in another jurisdiction."

CONCLUSION.

Respondent respectfully submits that this Court should deny the pending petition for the reason that the petition does not present issues within the considerations governing review on certiorari (Supreme Court Rule 19(a)). The questions presented have heretofore been settled and resolved by this Court and by many lower courts, and the decision of the Illinois Supreme Court is not contrary to the way this Court would probably apply its decisions.

Respectfully submitted,

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APPENDIX A.

INDIANA RULES OF TRIAL PROCEDURE.

I. Scope of Rules—One Form of Action.

Trial Rule 1.

Scope of the Rules.

Except as otherwise provided, these rules govern the procedure and practice in all courts of the state of Indiana in all suits of a civil nature whether cognizable as cases at law, in equity, or of statutory origin. They shall be construed to secure the just, speedy and inexpensive determination of every action.

Trial Rule 2.

One Form of Action.

(A) There shall be one [1] form of action to be known as "civil action."

(B) The right of a civil action is not merged in a public offense or a public remedy, but may, in all cases, be sought independently of and in addition to the punishment given or relief granted for the public offense.

II. Commencement of Action; Service of Process, Pleadings, Motions and Orders.

Trial Rule 3.

Commencement of an Action.

A civil action is commenced by filing a complaint with the court or such equivalent pleading or document as may be specified by statute.

Trial Rule 4.

Process.

(A) *Jurisdiction over parties or persons—In general.* The court acquires jurisdiction over a party or person who under these rules commences or joins in the action, is served with summons or enters an appearance, or who is subjected to the power of the court under any other law.

(B) *Preparation of summons and praecipe.* Contemporaneously with the filing of the complaint or equivalent pleading, the person seeking service or his attorney shall promptly prepare and furnish to the clerk as many copies of the complaint and summons as are necessary. The clerk shall examine, date, sign, and affix his seal to the summons and thereupon issue and deliver the papers to the appropriate person for service. Affidavits, requests, and any other information relating to the summons and its service as required or permitted by these rules shall be included in a praecipe attached to or entered upon the summons. Such praecipe shall be deemed to be a part of the summons for purposes of these rules. Separate or additional summons shall as provided by these rules be issued by the clerk at any time upon proper request of the person seeking service or his attorney.

(C) *Form of summons.* The summons shall contain:

(1) The name and address of the person on whom the service is to be effected;

(2) The name of the court and the case number assigned to the case;

(3) The title of the case as shown by the complaint, but, if there are multiple parties, the title may be shortened to include only the first named plaintiff and defendant with an appropriate indication that there are additional parties;

(4) The name, address, and telephone number of the attorney for the person seeking service;

(5) The time within which these rules require the person being served to respond, and a clear statement that in case of his failure to do so, judgment by default may be rendered against him for the relief demanded in the complaint.

The summons may also contain any additional information which will facilitate proper service.

(D) *Designation of manner of service.* The person seeking service or his attorney may designate the manner of service upon the summons. If not so designated, the clerk shall cause service to be made by mail or other public means provided the mailing address of the person to be served is indicated in the summons or can be determined. If a mailing address is not furnished or cannot be determined or if service by mail or other public means is returned without acceptance, the complaint and summons shall promptly be delivered to the sheriff or his deputy who, unless otherwise directed, shall serve the summons.

(E) *Summons and complaint served together—Exceptions.* The summons and complaint shall be served together unless otherwise ordered by the court. When service of summons is made by publication, the complaint shall not be published. When jurisdiction over a party is dependent upon service of process by publication or by his appearance, summons and complaint shall be deemed to have been served at the end of the day of last required publication in the case or service by publication, and at the time of appearance in jurisdiction acquired by appearance. Whenever the summons and complaints are not served or published together, the summons shall contain the full, unabbreviated title of the case.

Trial Rule 4.1.

Summons: Service on Individuals.

(A) *In general.* Service may be made upon an individual, or an individual acting in a representative capacity, by

(1) sending a copy of the summons and complaint by registered or certified mail or other public means by which a written acknowledgment of receipt may be requested and obtained to his residence, place of business or employment with return receipt requested and returned showing receipt of the letter; or

(2) delivering a copy of the summons and complaint to him personally; or

(3) leaving a copy of the summons and complaint at his dwelling house or usual place of abode. Amended Jan. 1, 1971.

(4) serving his agent as provided by rule, statute or valid agreement.

(B) *Copy service to be followed with mail.* Whenever service is made under part (3) or (4) of subdivision (A), the person making the service also shall send by first class mail, a copy of the summons without the complaint to the last known address of the person being served, and this fact shall be shown upon the return.

Trial Rule 4.2.

Summons: Service Upon Infant or Incompetents.

(A) *Service upon infants.* Service upon an individual known to be an infant shall be made upon his next friend or guardian ad litem, if service is with respect to the same action in which the infant is so represented. If there is no next friend or guardian ad litem, service

shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, service shall be made upon either parent known to have custody of the infant, or if there is no parent, upon a person known to be standing in the position of custodian or parent. The infant shall also be served if he is fourteen [14] years of age or older. In the event that service, as provided above, is not possible, service shall be made on the infant.

(B) *Service upon incompetents.* Service upon an individual who has been adjudged to be of unsound mind, otherwise incompetent or who is believed to be such shall be made upon his next friend or guardian ad litem, if service is with respect to the same action in which the incompetent is so represented. If there is no next friend or guardian ad litem, service shall be made upon his court-appointed representative if one is known and can be served within this state. If there is no court-appointed representative, then upon the named party and also upon a person known to be standing in the position of custodian of his person.

(C) *Duty to inform court—Appearance.* Nothing herein is intended to affect the duty of a party to inform the court that a person is an infant or incompetent. An appearance by a court-appointed guardian, next friend or guardian ad litem or his attorney shall correct any defect in service under this section unless such defect be challenged.

Trial Rule 4.3.

Summons: Service Upon Institutionalized Persons.

Service of summons upon a person who is imprisoned or restrained in an institution shall be made by delivering or mailing a copy of the summons and complaint to the

official in charge of the institution. It shall be the duty of said official to immediately deliver the summons and complaint to the person being served and allow him to make provisions for adequate representation by counsel. The official shall indicate upon the return whether the person has received the summons and been allowed an opportunity to retain counsel.

Trial Rule 4.4.

Service Upon Persons in Actions For Acts Done in This State or Having an Effect in This State.

(A) *Acts serving as a basis for jurisdiction.* Any person or organization that is a nonresident of this state, a resident of this state who has left the state, or a person whose residence is unknown, submits to the jurisdiction of the courts of this state as to any action arising from the following acts committed by him or his agent:

(1) doing any business in this state;

(2) causing personal injury or property damage by an act or omission done within this state;

(3) causing personal injury or property damage in this state by an occurrence, act or omission done outside this state if he regularly does or solicits business or engages in any other persistent course of conduct, or derives substantial revenue or benefit from goods, materials, or services used, consumed, or rendered in this state;

(4) having supplied or contracted to supply services rendered or to be rendered or goods or materials furnished or to be furnished in this state;

(5) owning, using, or possessing any real property or an interest in real property within this state; or

(6) contracting to insure or act as surety for or on behalf of any person, property or risk located within this state at the time the contract was made;

(7) living in the marital relationship within the state notwithstanding subsequent departure from the state, as to all obligations for alimony, custody, child support, or property settlement, if the other party to the marital relationship continues to reside in the state. Amended eff. Jan. 1, 1971.

(B) *Manner of service.* A person subject to the jurisdiction of the courts of this state under this rule may be served with summons:

(1) As provided by Rules 4.1 (service on individuals), 4.5 (service upon resident who cannot be found or served within the state), 4.6 (service upon organizations), 4.9 (in rem actions); or

(2) The person shall be deemed to have appointed the Secretary of State as his agent upon whom service of summons may be made as provided in Rule 4.10.

(C) *More convenient forum.* Jurisdiction under this rule is subject to the power of the court to order the litigation to be held elsewhere under such reasonable conditions as the court in its discretion may determine to be just.

In the exercise of that discretion the court may appropriately consider such factors as:

(1) Amenability to personal jurisdiction in this state and in any alternative forum of the parties to the action;

(2) Convenience to the parties and witnesses of the trial in this state in any alternative forum;

(3) Differences in conflict of law rules applicable in this state and in the alternative forum; or

(4) Any other factors having substantial bearing upon the selection of a convenient, reasonable and fair place of trial.

Trial Rule 4.5.

Summons: Service Upon Resident Who Cannot Be Found or Served Within the State.

When the person to be served is a resident of this state who cannot be served personally or by agent in this state and either cannot be found, has concealed his whereabouts or has left the state, summons may be served in the manner provided by Rule 4.9 (summons in in rem actions).

Trial Rule 4.6.

Service Upon Organizations.

(A) *Persons to be served.* Service upon an organization may be made as follows:

(1) In the case of a domestic or foreign organization upon an executive officer thereof, or if there is an agent appointed or deemed by law to have been appointed to receive service, then upon such agent.

(2) In the case of a partnership, upon a general partner thereof.

(3) In the case of a state governmental organization upon the executive officer thereof and also upon the Attorney General.

(4) In the case of a local governmental organization upon the executive thereof, and if a statute provides for an attorney to represent the local government organization, and an attorney occupies such position, then also upon such attorney.

(5) When, in subsections (3) and (4) of this subdivision, a governmental representative is named as a party in his individual name or in such name along with his official title, then also upon such representative.

(B) *Manner of service.* Service under subdivision (A) of this rule shall be made on the proper person in the manner provided by these rules, for service upon individuals, but a person seeking service or his attorney shall not knowingly direct service to be made at the person's dwelling house or place of abode, unless such is an address furnished under the requirements of a statute or valid agreement, or unless an affidavit on or attached to the summons states that service in another manner is impractical.

(C) *Service at organization's office.* When shown upon an affidavit or in the return, that service upon an organization cannot be made as provided in subdivisions (A) or (B) of this rule, service may be made by leaving a copy of the summons and complaint at any office of such organization located within this state with the person in charge of such office.

Trial Rule 4.7.

Summons: Service Upon Agent Named by Statute or Agreement.

Whenever an agent (other than an agent appointed to receive service for a governmental organization of this state) has been designated by or pursuant to statute or valid agreement to receive service for the person being served, service may be made upon such agent as follows:

(1) If the agent is a governmental organization or officer designated by or pursuant to statute, service shall be made as provided in Rule 4.10.

(2) If the agent is one other than that described above, service shall be made upon him as provided in Rule 4.1 (service upon individuals) or 4.6 (service upon organizations). If service cannot be made upon such agent, because there is no address furnished as required by

statute or valid agreement or his whereabouts in this state are unknown, then his principal shall be deemed to have appointed the Secretary of State as a replacement for the agent and service may be made upon the Secretary of State as provided in Rule 4.10.

Trial Rule 4.8.

Summons: Service of Pleadings or Summons on Attorney General.

Service of a copy of the summons and complaint or any pleading upon the Attorney General under these rules or any statute shall be made by personal service upon him, a deputy or clerk at his office, or by mail or other public means to him at such office in the manner provided by Rule 4.1 (A) (1), and by Rule 4.11 to the extent applicable.

Trial Rule 4.9.

Summons: In Rem Actions.

(A) *In general.* In any action involving a res situated within this state, service may be made as provided in this rule. The court may render a judgment or decree to the extent of its jurisdiction over the res.

(B) *Manner of service.* Service under this rule may be made as follows:

(1) By service of summons upon a person or his agent pursuant to these rules; or

(2) By service of summons outside this state in a manner provided by Rule 4.1 (service upon individuals) or by publication outside this state in a manner provided by Rule 4.13 (service by publication) or outside this state in any other manner as provided by these rules; or

(3) By service by publication pursuant to Rule 4.13.

Trial Rule 4.10.

Summons: Service Upon Secretary of State or Other Governmental Agent.

(A) *In general.* Whenever, under these rules or any statute, service is made upon the Secretary of State or any other governmental organization or officer, as agent for the person being served, service may be made upon such agent as provided in this rule.

(1) The person seeking service or his attorney shall:

(a) submit his request for service upon the agent in the praecipe for summons, and state that the governmental organization or officer is the agent of the person being served;

(b) state the address of the person being served as filed and recorded pursuant to a statute or valid agreement, or if no such address is known then his last known mailing address, and, if no such address is known, then such shall be stated;

(c) pay any fee prescribed by statute to be forwarded together with sufficient copies of the summons, affidavit and complaint, to the agent by the clerk of the court.

(2) Upon receipt thereof the agent shall promptly:

(a) send to the person being served a copy of the summons and complaint by registered or certified mail or by other public means by which a written acknowledgment of receipt may be obtained;

(b) complete and deliver to the clerk an affidavit showing the date of the mailing, or if there was no mailing, the reason therefor;

(c) send to the clerk a copy of the return receipt along with a copy of the summons;

(d) file and retain a copy of the return receipt.

Trial Rule 4.11.

Summons: Registered or Certified Mail.

Whenever service by registered or certified mail or other public means by which a return receipt may be requested is authorized, the clerk of the court or a governmental agent under Rule 4.10 shall send the summons and complaint to the person being served at the address supplied upon the summons, or furnished by the person seeking service. In his return the clerk of the court or the governmental agent shall show the date and place of mailing, *a copy of the return receipt if and when received by him showing whether the mailing was accepted or returned, and, if accepted, by whom.* The return along with the receipt shall be promptly filed by the clerk with the pleadings and become a part of the record. If a mailing by the clerk of the court is returned without acceptance, the clerk shall reissue the summons and complaint for service as requested, by the person seeking service.

Amended Jan. 1, 1971.

Trial Rule 4.12.

Summons: Service by Sheriff or Other Officer.

(A) *In general.* Whenever service is made by delivering a copy to a person personally or by leaving a copy at his dwelling house or place of employment as provided by Rule 4.1, summons shall be issued to and served by the sheriff, his deputy, or some person specially or regularly appointed by the court for that purpose. Service shall be effective if made by a person not otherwise authorized by these rules, but proof of service by such a person must be made by him as a witness or by deposition without allowance of expenses therefor as costs. The person to whom the

summons is delivered for service must act promptly and exercise reasonable care to cause service to be made.

(B) *Special service by police officers.* A sheriff, his deputy, or any full-time state or municipal police officer may serve summons in any county of this state if he agrees or has agreed to make the service. When specially requested in the praecipe for summons, the complaint and summons shall be delivered to such officer by the clerk or the attorney for the person seeking service. No agreement with the sheriff or his deputy for such service in the sheriff's own county shall be permitted. In no event shall any expenses agreed upon under this provision be assessed or recoverd as costs or affect court costs otherwise imposed for regular service.

(C) *Service in other counties.* A summons may be served in any county in this state. If service is to be made in another county, the summons may be issued by the clerk for service therein to the sheriff of such county or to a person authorized to make service by these rules.

(D) *Service outside the state.* Personal service, when permitted by these rules to be made outside the state, may be made there by any disinterested person or by the attorney representing the person seeking such service. The expenses of such person may be assessed as costs only if they are reasonable and if service by mail or other public means cannot be made or is not successful.

Trial Rule 4.13.

Summons: Service by Publication.

(A) *Praecipe for summons by publication.* In any action where notice by publication is permitted by these rules or by statute, service may be made by publication. Summons by publication may name all the persons to be

served, and separate publications with respect to each party shall not be required. The person seeking such service, or his attorney, shall submit his request therefor upon the praecipe for summons along with supporting affidavits that diligent search has been made that the defendant cannot be found, has concealed his whereabouts, or has left the state, and shall prepare the contents of the summons to be published. The summons shall be signed by the clerk of the court or the sheriff in such manner as to indicate that it is made by his authority.

(B) *Contents of summons by publication.* The summons shall contain the following information:

(1) The name of the person being sued, and the person to whom the notice is directed, and, if the person's whereabouts are unknown or some or all of the parties are unknown, a statement to that effect;

(2) The name of the court and cause number assigned to the case;

(3) The title of the case as shown by the complaint, but if there are multiple parties, the title may be shortened to include only the first named plaintiff and those defendants to be served by publication with an appropriate indication that there are additional parties;

(4) The name and address of the attorney representing the person seeking service;

(5) A brief statement of the nature of the suit, which need not contain the details and particulars of the claim. A description of any property, relationship, or other res involved in the action, and a statement that the person being sued claims some interest therein;

(6) A clear statement that the person being sued must respond within thirty [30] days after the last notice of the action is published, and in case he fails to do so, judg-

ment by default may be entered against him for the relief demanded in the complaint.

(C) *Publication of summons.* The summons shall be published three [3] times by the clerk or person making it, the first publication promptly and each two [2] succeeding publications at least seven [7] and not more than fourteen [14] days after the prior publication, in a newspaper authorized by law to publish notices, and published in the county where the complaint or action is filed, where the res is located, or where the defendant resides or where he was last known to reside. If no newspaper is published in the county, then the summons shall be published in the county in this state nearest thereto in which any such paper may be printed, or in a place specially ordered by the court. The person seeking the service or his attorney may designate any qualified newspaper, and if he fails to do so, the selection may be made by the clerk.

(D) *By whom made or procured.* Service of summons by publication shall be made and procured by the clerk, by a person appointed by the court for that purpose, or by the clerk or sheriff of another county where publication is to be made.

(E) *Return.* The clerk or person making the service shall prepare the return and include the following:

(1) Any supporting affidavits of the printer containing a copy of the summons which was published;

(2) An information or statement that the newspaper and the publication meet all legal requirements applicable to such publication;

(3) The dates of publication.

The return and affidavits shall be filed with the pleadings and other papers in the case and shall become a part of the record as provided in these rules.

Trial Rule 4.14.

Territorial Limits and Service Under Special Order.

(A) *Territorial limits of effective service.* Process may be served anywhere within the territorial limits of this state and outside the state as provided in these rules.

(B) *Service under special order of court.* Upon application of any party the court in which any action is pending may make an appropriate order for service in a manner not provided by these rules or statutes when such service is reasonably calculated to give the defendant actual knowledge of the proceedings and an opportunity to be heard.

Trial Rule 4.15.

Summons: Proof of Service Return—Amendments —Defects.

(A) *Return—Form.* The person making service shall promptly make his return upon or attach it to a copy of the summons which shall be delivered to the clerk. The return shall be signed by the person making it, and shall include a statement:

(1) that service was made upon the person as required by law and the time, place, and manner thereof;

(2) if service was not made, the particular manner in which it was thwarted in terms of fact or in terms of law;

(3) such other information as is expressly required by these rules.

(B) *Return and affidavits as evidence.* The return, along with the summons to which it is attached or is a part, the praecipe for summons, affidavits furnished with the summons or praecipe for summons, and all other affidavits permitted by these rules shall be filed by the clerk with the pleadings and other papers in the case and

thereupon shall become a part of the record, and have such evidentiary effect as is now provided by law. Copies of such record shall be admissible in all actions and proceedings and may be entered in any public records when certified over the signature of the clerk or his deputy and the clerk's seal.

(C) *Proof of filing and issuance dates.* The clerk shall enter a filing date upon every praecipe, pleading, return, summons, affidavit or other paper filed with or entered of record by him. The clerk shall also enter an issuance date upon any summons issued, mailed or delivered by him, or other communication served or transmitted by him under these rules. Such filing or issuance date shall constitute evidence of the date of filing or issuance without further authentication when entered in the court records, or when the paper or a copy thereof is otherwise properly offered or admitted into evidence.

(D) *Admission of service.* A written admission stating the date and place of service, signed by the person being served, may be filed with the clerk who shall file it with the pleadings. Such admission shall become a part of the record, constitute evidence of proper service, and shall be allowed as evidence in any action or proceeding.

(E) *Amendment.* At any time in its discretion and upon such terms as it deems just, the court may allow any process of proof of service thereof to be amended unless it clearly appears that material prejudice would result to the substantial rights of the person against whom the process is issued.

(F) *Defects in summons.* No summons or the service thereof shall be set aside or be adjudged insufficient when either is reasonably calculated to inform the person to be served that an action has been instituted against him, the name of the court, and the time within which he is required to respond.

Trial Rule 4.16.

Summons: Duties of Persons to Aid in Service.

(A) It shall be the duty of every person being served under these rules to cooperate, accept service, comply with the provisions of these rules, and, when service is made upon him personally, acknowledge receipt of the papers in writing over his signature.

(B) Anyone accepting service for another person is under a duty to

(1) promptly deliver the papers to that person;

(2) promptly notify that person that he holds the papers for him; or

(3) within a reasonable time, in writing, notify the clerk or person making the service that he has been unable to make such delivery of notice when such is the case.

(C) No person through whom service is made under these rules may impose any sanction, penalty, punishment, or discrimination whatsoever against the person being served because of such service. Any person willfully violating any provision of this rule may be subjected to contempt proceedings.

Trial Rule 4.17.

Summons: Certain Proceedings Excepted.

Rules 4 through 4.16 shall not replace the manner of serving summons or giving notice as specially provided by statute or rule in proceedings involving, without limitation, the administration of decedent's estates, guardianships, receiverships, assignments for the benefit of creditors.

APPENDIX B.

BURNS INDIANA STATUTES ANNOTATED
SECTION 3-1205.

"**Summons and service.**—The clerk of the court in which such petition is filed shall issue a summons for the defendant to appear and answer said petition, which summons shall be personally served on said defendant, if a resident of the state, either by reading or leaving a copy thereof at his or her usual place of residence; such usual place to be the residence of such defendant at the time the copy is so left. [Acts 1873, ch. 43, § 11, p. 107.]"

APPENDIX C.

BURNS INDIANA STATUTES ANNOTATED
SECTION 3-1219.

"**Guardianship, custody, support and education of children.**—The court in decreeing a divorce shall make provision for the guardianship, custody, support, and education of the minor children of such marriage; and the court may require the father to provide all or some specified part of the cost of education of such child or children beyond the twelfth year of education provided by the public schools, taking into consideration the earnings of the father, the station in life of the parents and child or children involved, the aptitude of the child or children as evidenced by school records, the separate property of the child or children, and all other relevant factors: Provided, That the jurisdiction over the child or children shall remain in the court at all times during the child's or children's minority and shall not be lost because of the death of either parent. [Acts 1873, ch. 43, § 21, p. 107; 1961, ch. 170, § 1, p. 380; 1965, ch. 57, § 1, p. 88.]"

APPENDIX D.

UNITED STATES CONSTITUTION
ARTICLE IV, SECTION 1.

"Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

APPENDIX E.

UNITED STATES CODE ANNOTATED
TITLE 28, SECTION 1738.

"The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947."

APPENDIX F.

ILLINOIS REVISED STATUTES
CHAPTER 110, SECTION 1.

(Illinois Civil Practice Act.)

Scope of Act. The provisions of this Act apply to all civil proceedings, both at law and in equity, except in attachment, ejectment, eminent domain, forcible entry and detainer, garnishment, habeas corpus, mandamus, ne exeat, quo warranto, replevin, foreclosure of mortgages or other proceedings in which the procedure is regulated by separate statutes. In all those proceedings the separate statutes control to the extent to which they regulate procedure, but this Act applies as to matters of procedure not so regulated by separate statutes. As to all matters not regulated by statute or rule of court, the practice at common law and in equity prevails. As amended by act approved Aug. 9, 1963. L. 1963, p. 2691. Effective Jan. 1, 1964.

APPENDIX G.

ILLINOIS REVISED STATUTES
CHAPTER 65, SECTION 19.

(Illinois Habeas Corpus Act.)

"The party imprisoned or restrained may deny any of the material facts set forth in the return, and may allege any other facts that may be material in the case, which denial or allegation shall be on oath; and the court or judge shall proceed in a summary way to examine the cause of the imprisonment or restraint, hear the evidence produced by any person interested or authorized to appear, both in support of such imprisonment or restraint and against it, and thereupon shall dispose of the party as the case may require. 1874, March 2, R. S. 1874, p. 565, § 19."

APPENDIX H.

DIVORCE DECREE OF THE SUPERIOR COURT OF VIGO COUNTY, INDIANA.

(Entered June 21, 1971.)

STATE OF INDIANA } SS:
COUNTY OF VIGO }

IN THE SUPERIOR COURT OF VIGO COUNTY

1971 Term

JULIUS LOESER,
Plaintiff,
vs.
JILL S. LOESER,
Defendant.

No. S-71-250

DECREE.

Comes now the plaintiff in person and by counsel and it appearing to the court that:

(a) Defendant, Jill S. Loeser, was, at the time of filing the complaint in this action on the 19th day of April, 1971, a bona fide resident of Terre Haute, in Vigo County, Indiana;

(b) That Jill S. Loeser, a resident of the State of Indiana, left the state prior to the filing of this action;

(c) That this is an action for divorce;

(d) That plaintiff herein, Julius Loeser, was, at the time of filing this complaint and now is a continuous and bona fide resident of Terre Haute, Vigo County, in the State of Indiana, for thirty years;

(e) That plaintiff and defendant herein were living in the marital relationship in the State of Indiana at the time of the filing of this complaint, and that plaintiff, at all times herein relevant, continued to reside in the State of Indiana;

(f) Service of summons and complaint upon the defendant herein was made upon her by sending a copy of the summons and complaint by certified United States mail, return receipt requested;

(g) That a copy of said summons and complaint was duly served upon the defendant by the clerk of the Superior Court of Vigo County on the 19th day of April, 1971, and the clerk's certificate of mailing certifies to said service;

(h) That said summons and complaint were duly served upon the defendant by certified mail, return receipt requested; that said receipt was duly received by the clerk of the Superior Court of Vigo County and the clerk duly certified to the return of service of said summons and complaint;

(i) That this court has jurisdiction of the parties plaintiff and defendant and of the subject matter;

(j) The court further finds that plaintiff and defendant are the owners, as tenants by the entireties, of the following described real estate in Terre Haute, Vigo County, Indiana, to-wit:

Lot No. Seven (7) in Heritage Subdivision, being a subdivision of a part of the Northwest Quarter (NW¼) of Section Twenty-five

(25), Township Twelve (12) north, Range Nine (9) west, as per recorded plat thereof recorded in Plat Record 18, page 32 of the records of the Recorder's office of Vigo County, Indiana, in the City of Terre Haute, Vigo County, Indiana;

and

(k) The court further finds that the parties, either jointly or individually, were the owners of certain personal property, namely, furniture, household goods, appliances, cooking utensils and all other personal property in the home.

And it further appearing to the court that this cause has been duly filed for more than sixty days, the defendant, Jill S. Loeser, having failed to appear, and the prosecutor of Vigo County, Indiana, Ralph Berry, now appearing, the defendant is now three times audibly called in open court and appearing not, is defaulted; that this cause is at issue upon the answer filed by Ralph Berry, prosecutor of Vigo County, Indiana, the same is now submitted to the court for trial and findings without the intervention of a jury.

And the court having heard the evidence and being duly advised in the premises, now finds:

(a) That plaintiff and defendant were continuous and bona fide residents of Terre Haute, in Vigo County, Indiana, for more than six months last past and of the State of Indiana for more than one year immediately preceding the filing of the above entitled cause of action, being the 19th day of April, 1971;

(b) That the allegations of plaintiff's complaint are true; and

(c) That prior to the filing of the complaint herein, defendant was guilty of cruel and inhuman treat-

ment toward the plaintiff, and that defendant was guilty of adultery prior to the filing of the complaint herein, and that plaintiff did not condone said misconduct on the part of the defendant.

The court now further finds that plaintiff is entitled to a decree of divorce from the defendant on the grounds set forth above.

The court further finds that plaintiff is a suitable and proper person to have the care, custody, control and education of Jeffrey Michael Loeser, born January 22, 1968, child of plaintiff and defendant, and the court further finds that defendant is not a fit and proper person to have the care, custody, control and education of Jeffrey Michael Loeser.

It Is, Therefore, Considered, Ordered, Adjudged and Decreed by the court that the bonds of matrimony heretofore existing between plaintiff and defendant herein be, and they hereby are, dissolved, and that plaintiff is hereby granted an absolute divorce from defendant;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff have the care, custody, control and education of Jeffrey Michael Loeser, child of plaintiff and defendant, born January 22, 1968, and that defendant have reasonable rights of visitation of their said son;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff be, and he hereby is, declared to be the sole and absolute owner, subject to all liens and encumbrances, of the following described real estate in Vigo County, Indiana, to-wit:

Lot No. Seven (7) in Heritage Subdivision, being a subdivision of a part of the Northwest Quarter (NW¼) of Section Twenty-five (25), Township Twelve (12) north, Range Nine (9) west, as per recorded plat thereof recorded in Plat Record 18, page 32 of the

records of the Recorder's office of Vigo County, Indiana, in the City of Terre Haute, Vigo County, Indiana,

and defendant is ordered and directed to execute a quitclaim deed to the above described real estate to plaintiff, and failing to do so within ten days from entry hereof, the court appoints David E. Rosenfeld commissioner, with full power and authority in the premises to convey said real estate, on behalf of plaintiff, in accordance with the provisions hereof;

It Is Further Considered, Ordered, Adjudged and Decreed by the court that plaintiff be, and he hereby is, declared the sole and absolute owner of all furniture, household goods and all other personal property located in the real estate described above.

Judgment accordingly.

/s/ HAROLD J. BITZAGIO,
Judge, Superior Court of Vigo County.